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No. 83-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Cross-Petitioner,

v.

MCI COMMUNICATIONS CORPORATION AND
MCI TELECOMMUNICATIONS CORPORATION,
Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE CROSS-RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the cross-petition should be dismissed as untimely?

2. Whether the Communications Act immunized AT&T's denials of connections to a competitor, where the denials violated the FCC's prior directives and were undertaken for anticompetitive rather than for public interest purposes?[1]

3. Whether AT&T's claimed regulatory defense was adequately presented to the jury by instructions which expressly restated AT&T's trial contention that its connection denials were "based upon a good faith belief that [to provide connections] would have violated established regulatory policies and therefore that it acted reasonably in all the circumstances"?

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[1] Defendant American Telephone and Telegraph Company is referred to in this brief as "AT&T", and plaintiffs MCI Communications Corporation and MCI Telecommunications Corporation are referred to as "MCI".

STATEMENT REQUIRED BY RULE 28.1

Cross-respondents MCI Communications Corporation and MCI Telecommunications Corporation are also respondents on AT&T's initial petition in No. 83-21. Cross-respondents are also petitioners in No. 83-32, and were plaintiffs, appellees and cross-appellants below.

MCI Communications Corporation is the parent corporation of MCI Telecommunications Corporation. MCI Communications Corporation has no parent corporation. Neither MCI Communications Corporation nor MCI Telecommunications Corporation has any subsidiary which is not wholly owned.

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COUNTERSTATEMENT OF THE CASE

AT&T's untimely cross-petition seeks to present issues not raised either in its petition for certiorari (No. 83-21) or in MCI's petition (No. 83-32).[2] AT&T's cross-petition is premised on the factual contention, rejected by the jury and the court of appeals, that it denied MCI connections out of reasonable concern for the public interest and confusion about the regulator's prior orders to connect. (Cross-petition 3-6; Instrs. 26, 27, App. 219a-22a; Op., App. 99a-102a.) AT&T does not seek review of the facts, and yet it would have the Court believe that it has been held liable "simply because it did not accurately predict how the FCC would

[2] References to the court of appeals' opinion are to the Appendix filed with MCI's petition (No. 83-32), and other citations follow the conventions used in MCI's petition. (MCI Petition 1 n.2.)

ultimately resolve the public interest questions raised." (Cross-petition 17 n.13.) On the facts found by the jury, AT&T presents no issue deserving review.

AT&T's connection denials were, as a matter of law, contrary to the established policy and prior orders of the FCC. The FCC's 1971 *Specialized Common Carriers* decision found MCI's provision of the disputed services to be in the public interest, authorized MCI to provide these services, and obligated AT&T to provide the appropriate connections. (Op., App. 88a-90a.)[3]

The trial court afforded AT&T full opportunity to prove that its denials were reasonably based on public interest considerations. (Op., App. 91a-92a, 95a-102a.) The trial court explained AT&T's position that "it agreed to provide MCI with facilities and interconnections it believed in good faith MCI was entitled to receive" and that AT&T's denial of connections "was based upon a good faith belief that it would have violated established regulatory policies and therefore that it acted reasonably in all the circumstances." (Instr. 26, App. 219a-20a.) The jury was instructed that if AT&T denied the connections for reasons such as a good faith belief "that it had not been ordered [to connect], that MCI was not authorized to provide the service, and that it would have violated established regulatory policies for MCI to receive the connections," then "the refusal . . . was not anti-competitive conduct and cannot be considered conduct engaged in for the purpose of maintaining a monopoly." (Instr. 27, App. 221a-22a.) MCI had the burden to prove that in refusing the

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[3] *Specialized Common Carriers*, 29 F.C.C. 2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (PX 1). *See Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C. 2d 413, 426-28, 435-36, *aff'd sub nom. Bell Telephone Co.* v. *FCC*, 503 F.2d 1250, 1259-63 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *MCI Telecommunications Corp.* v. *FCC* ("*Execunet*"), 561 F.2d 365, 378-80 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

connections "AT&T acted with anti-competitive intent, for the purpose of maintaining a monopoly, rather than for what it in good faith regarded as legitimate reasons." (*Id.*) The jury found that MCI met this extraordinary burden.

Ample evidence supported the jury's conclusion. The Commission's 1971 decision did not specify the details of AT&T's connection obligations; rather, the Commission relied upon "the representations of AT&T" that it would negotiate with MCI and other new carriers. *Specialized Common Carriers*, *supra*, 29 F.C.C. 2d at 940. (Op., App. 11a.) In fact, AT&T had made the decision to deny connections "regardless of the meaning of the 1971 decision," and its offer to negotiate was merely a delaying tactic. (Op., App. 100a, 135a-38a.)

Faced with MCI's insistence on the disputed connections, AT&T in bad faith discouraged MCI from complaining to the FCC, assuring MCI that the connection issues would be amicably resolved. (Op., App. 11a; Tr. 923, 990, 999-1000; PX 33.) In December 1972, AT&T sent MCI's chairman a conciliatory letter, which was intended "to forestall a request for detailed comments from the FCC staff on MCI's latest allegations" concerning connection denials. (PX 3197.) In August 1973, AT&T decided to implement its decision to refuse connections by filing tariffs with the separate state regulatory commissions rather than the FCC, when it knew the state commissions lacked jurisdiction. (Op., App. 14a, 133a-34a.) AT&T did not advise MCI or the FCC of its decision, but instead deceptively continued to engage MCI in negotiations while it prepared the tariffs. (Op., App. 14a, 135a.)

AT&T's connection denials aimed to protect AT&T's economic interests, not the public interest. (Op., App. 99a-102a.) AT&T recognized that in requesting the connections, "MCI was trying to enlarge the number of customers they could serve" and that denial would shield over half of AT&T's private line revenues from competition. (PX 207 at 1899.)

AT&T's policy was designed " 'to limit competitive encroachments through devices such as restricting the use other carriers may make of our facilities.' " (Op., App. 100a, quoting from PX 273B at 1007.) In AT&T's own words, it denied MCI's connection requests "for competitive reasons." (PX 216 at 1374.)

AT&T's own analysis of the situation recognized the "threat of antitrust action." (PX 273B at 1081.) The chief of the FCC's Common Carrier Bureau told AT&T's general counsel months before the final refusal that AT&T was "getting into a lot of trouble with potential antitrust liabilities . . . for giving the short shrift to the new carriers." (Tr. 9916.) Despite warnings and recognized risk, AT&T treated the antitrust threat "in the same manner as any other business risk." (PX 273B at 1081.)

SUMMARY OF ARGUMENT

AT&T's cross-petition improperly raises issues which could have been raised in its timely petition for certiorari. AT&T misuses the 1980 amendment to this Court's rules allowing additional time for the filing of cross-petitions, in order to tender its new issues to this Court. Rule 19.5 does not authorize a party who has petitioned for certiorari to raise new issues after the ordinary certiorari period. AT&T's cross-petition should be dismissed or denied for this reason.

Even if AT&T's cross-petition is properly filed, AT&T's argument that its connection denials should be immune from antitrust scrutiny does not deserve review. The FCC has expressly denied the need for exclusive regulatory jurisdiction as to these connection matters, and the circuit courts, applying this Court's controlling decisions, have uniformly denied AT&T's immunity arguments. The jury was adequately instructed to consider whether AT&T's conduct was reasonable in the context of the FCC's regulation and whether AT&T in fact refused connections based on a good faith interpretation of regulatory policy. The jury and the court of

appeals properly found that AT&T's connection denials were the result of its own business judgment and were intended to frustrate, rather than to implement, the regulator's policies. The jury's finding that AT&T unreasonably refused connections for anticompetitive reasons disposes of AT&T's regulatory policy defense.

ARGUMENT

I. Having Filed Its Petition For Certiorari, AT&T Should Not Now Be Permitted To Add Issues By Cross-Petition.

AT&T's initial petition (No. 83-21) challenges only the court of appeals' remand for a partial retrial limited to damages. Its cross-petition (No. 83-217) raises unrelated issues regarding antitrust immunity. AT&T filed its cross-petition after the expiration of the period for petitions for certiorari, relying upon the language of Supreme Court Rule 19.5 permitting conditional cross-petitions to be filed "[n]ot more than 30 days after receipt of the petition for certiorari."

Rule 19.5 could not have been intended to be used by parties like AT&T, which have already filed a petition. Rule 19.5 was adopted in 1980 to eliminate the need to file "protective" petitions or cross-petitions by parties who would not otherwise have sought review, thus reducing the total number of petitions received by this Court.[4] Like the parallel provision of Rule 4(a)(3) of the appellate rules, Rule 19.5 should be interpreted to provide "additional time to [petition] to all parties other than an initial [petitioner]." Committee Note of 1966, *reprinted in* 9 J. Moore and B. Ward, *Moore's Federal Practice* ¶ 203.25[3] (2d ed. 1983).[5] MCI has found

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[4] *See* 13 J. Moore, H. Bendix and B. Ringle, *Moore's Federal Practice* ¶ 800.05[2.-4] (2d ed. 1982); E. Gressman & R. Stern, *Supreme Court Rules: The 1980 Revisions* 16-17 (1980).

[5] Rule 19.5 apparently was patterned after Federal Rule of Appellate Procedure 4(a)(3). *See* R. Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 779-80 (1974).

no other instance in which a party which had already filed a petition also filed a cross-petition under Rule 19.5 after the expiration of the certiorari period. The effect of filings such as AT&T's would be to increase this Court's already crowded docket by allowing parties who have filed petitions within the ordinary period to file additional petitions on different issues. The Court should dismiss or deny AT&T's unauthorized second petition.

II. AT&T Is Not Immune From Antitrust Liability.

AT&T argues that, although the Communications Act contains no express antitrust immunity provision, immunity should be implied for its refusals to connect with MCI in order " 'to make the regulatory scheme work,' " and to ensure that firms like AT&T are not " 'subject[ed] . . . to conflicting standards.' " (Cross-petition 10-11, quoting authority.)

AT&T's argument runs afoul of this Court's decisions in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372-75 (1973) and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 595-98 (1976), and unanimous circuit application of those cases.[6] AT&T relies upon *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980), to support its immunity argument. (Cross-petition 11.) Yet *Mid-Texas* specifically rejected immunity for AT&T's connection decisions. 615 F.2d at 1380-81. The *Mid-Texas* court recognized the danger that a carrier could "rationalize a decision whose purpose is anticompetitive" and noted that the regulatory scheme afforded no way to compensate an injured competitor in such a case. 615 F.2d at 1380.

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[6] *See Northeastern Telephone Co.* v. *AT&T*, 651 F.2d 76, 82-84 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114, 1121-25 (3d Cir. 1979); *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, 1380-81 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980); *Sound, Inc.* v. *AT&T*, 631 F.2d 1324, 1327-31 (8th Cir. 1980); *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 726-35 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 785 (1983). *See also United States* v. *AT&T*, 461 F. Supp. 1314, 1326-29 (D.D.C. 1978).

Continued enforcement of the antitrust laws was therefore essential "in preventing misuse of the public interest standard." *Id.* With the exception of one district court[7], all courts have rejected AT&T's similar immunity arguments. The courts are not "split" on this issue. (Cross-petition 10 n.11.)

Implied immunity depends upon a conflict between antitrust and regulatory concerns, but AT&T does not identify the conflict relevant to its conduct toward MCI. Indeed, regulatory policy during the relevant period, like antitrust policy, was "designed to promote rather than inhibit competition in the specialized telecommunications field." (Op., App. 28a-29a.) "[T]he FCC did not control or approve of AT&T's actions [toward MCI]. Nor has the FCC supervised AT&T's interconnection practices so closely that the FCC's approval could be inferred." (Op., App. 26a-27a.) The FCC has taken the position that a carrier's choice not to connect is "a matter of business judgment," and with respect to such denials it perceives "no general reason why antitrust policy should be deemed inapplicable as a matter of law." Memorandum of FCC as *Amicus Curiae* at 15, in *United States* v. *AT&T*, No. 74-1698 (D.D.C.).[8]

To grant the immunity AT&T requests would frustrate the "fundamental national policies" of the antitrust laws. *Mid-Texas*, *supra*, 615 F.2d at 1380, *quoting Otter Tail Power Co.* v. *United States*, *supra*, 410 U.S. at 374; *see National Gerimedical Hospital and Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388 (1981).

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[7] *Southern Pacific Communications Co.* v. *AT&T*, 556 F. Supp. 825, 975-77, 1095-97 (D.D.C. 1983), *appeal pending*, No. 83-1102 (D.C. Cir.).

[8] The FCC's memorandum is reprinted in *Satellite Business Systems*, 62 F.C.C. 2d 997, 1102-32, 1112-13 (1977). *See also Sound, Inc.* v. *AT&T*, *supra*, 631 F.2d at 1331.

III. The Instructions Allowed Full Consideration Of AT&T's Regulatory Policy Defense.

Contrary to AT&T's assertions that the instructions treated regulation "almost as though it did not exist" (Cross-petition 16), the trial court fully presented AT&T's regulatory policy defense. The court required the jury to consider both the reasonableness of AT&T's conduct and AT&T's actual intent. (Instrs. 26, 27, App. 219a-22a, quoted in part *supra* at 2.) MCI had the burden of showing that AT&T did not in good faith believe that the refusals were justified by any "legitimate reasons," and the court advised the jury that no antitrust liability could be found if AT&T relied on regulatory considerations in refusing connections. (Instr. 27, App. 220a-22a.)[9] The jury heard voluminous evidence on regulation. Under detailed instructions the jury decided both that conduct such as AT&T's was not "objectively" reasonable in the regulatory context, and that AT&T actually conducted itself in bad faith.

AT&T's cross-petition does not refer to any proferred instruction incorporating an alternative "objective" standard. Moreover, AT&T itself placed its subjective intent in issue.[10]

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[9] AT&T complains of "the unseemly spectacle of a jury trying to interpret a regulatory decision." (Cross-petition 12.) But AT&T's defense that it did not understand the *Specialized Common Carriers* decision could not be accommodated without allowing the jury to analyze the language of the decision as a question of fact. As the court of appeals correctly noted,

> Although that approach improperly allowed the jury to decide what amounted to a question of law, the only party that could have been harmed by that error was MCI, whose case would have been cut short only by a legally *incorrect* finding that no interconnections were required. Judge Grady's approach could not have prejudiced AT&T, and only *that* possibility concerns us on appeal.

(Op., App. 91a-92a, emphasis in original.) AT&T complains of a harmless error which its own defense invited.

[10] AT&T's instructions would have required MCI to prove that defendant's denials were "unreasonable and reflected an intent to

(footnote continued on next page)

AT&T nevertheless argues that if a hypothetical person could have legitimately misunderstood the FCC's 1971 decision and reasonably denied connections, AT&T could not be held liable despite its actual anticompetitive intent. AT&T now seeks an instruction that would preclude any inquiry into its actual intent. (Cross-petition 16-18.)

The Fifth Circuit's decision in *Mid-Texas Communications Systems, Inc.* v. *AT&T, supra*, 615 F.2d 1372, does not support AT&T's contention on this point. That court specifically found that AT&T's regulatory policy defense could prevail only "[i]f Bell was correct in its assessment, *and if its purpose in refusing interconnection was to vindicate the public interest.*" 615 F.2d at 1390 (emphasis supplied).[11] Nor do the other cases cited by AT&T support its view that, unlike all other antitrust defendants, a regulated defendant's actual intent is irrelevant.[12]

(footnote continued from preceding page)

maintain a monopoly in the relevant market." (Defendant's Proposed Instrs. 38A, 29, 37.)

[11] In this case, unlike *Mid-Texas*, it was clear before AT&T's conduct was challenged in an antitrust court that AT&T's "assessment" was not correct, because the FCC had decided in its 1971 *Specialized Common Carriers* decision that the connections MCI sought were required. See *supra* 2 and n.3; *Mid-Texas, supra*, 615 F.2d at 1389.

[12] *See Hospital Building Co.* v. *Trustees of Rex Hospital*, 691 F.2d 678, 685, 686 (4th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3738 (U.S. April 6, 1983) (No. 82-1633), *cross-petition for cert. filed*, 51 U.S.L.W. 3807 (U.S. April 28, 1983) (No. 82-1762) (planning activities of defendants are not unreasonable restraints of trade where "undertaken in good faith" and where activities "had the purpose" of effectuating regulatory policy); *Phonetele, Inc.* v. *AT&T, supra*, 664 F.2d at 738 (inquiry must focus on whether the defendants "did reasonably conclude" that their actions would serve the public interest); *Northeastern Telephone Co.* v. *AT&T, supra*, 651 F.2d 76 (not addressing the regulatory policy issue). AT&T's purported circuit conflict is illusory.

CONCLUSION

For the foregoing reasons, this Court should dismiss or deny AT&T's cross-petition for certiorari (No. 83-217). MCI continues to urge that the Court grant certiorari to review the questions raised in MCI's timely petition (No. 83-32).

Respectfully submitted,

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